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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 718

FETTIG CANNING COMPANY,
Petitioner,

v.

WILLIAM E. STECKLER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILLIAM C. BACHELDER,
EUGENE M. FIFE, JR.,
BACHELDER, BACHELDER & FIFE,
Attorneys for Petitioner.

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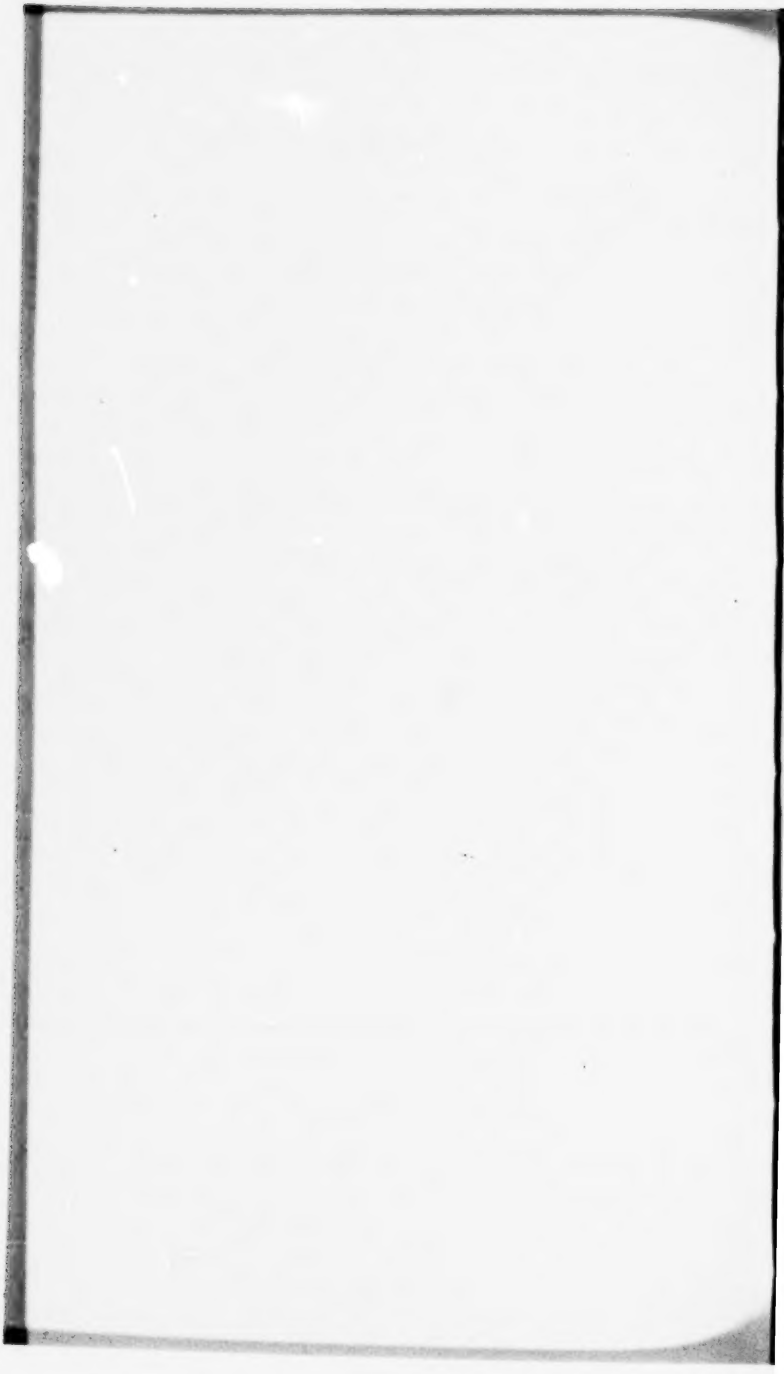

SUPREME COURT OF THE UNITED STATES

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WILLIAM E. STECKLER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Fettig Canning Company prays that a Writ of Certiorari issue to review the decree of the United States Court of Appeals for the 7th Circuit entered in the above entitled cause on March 12, 1951 denying a petition for writ of mandamus.

Opinion Below

The opinion of the United States Court of Appeals for the Seventh Circuit in this case is unreported as yet, but will be found at page 11 of the record herein.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, U. S. C. A., Section 2101(c).

Questions Presented

The questions presented are these:

I

Is a claimant in a libel brought under the Federal Food, Drug and Cosmetic Act (21 U. S. C. A., 334) entitled to invoke the provisions of 28 U. S. C. A. 1404(a) and transfer the case to any district where the goods "might have been seized"?

a. Does the fact that the goods were not seized until they reached their final destination bar the transfer to the district where they were first subject to seizure?

b. After a claimant appears to defend the libel is the case a civil action under the provisions of 28 U. S. C. A. 1404(a)?

c. Would a district court to whom such case was transferred have the power to enforce its decree upon the Marshal in the district where the goods were held?

II

Will the consent of both parties confer the power to decide the case in the district to which a libel under 21 U. S. C. A. 334 has been transferred?

Summary Statement

This is an original action brought in the United States Court of Appeals for the Seventh Circuit to mandate the Judge of the Southern District of Indiana to retain jurisdiction of two cases transferred from the Eastern District of Missouri. (R. 1).

The two cases transferred were originally brought in Missouri under 21 U. S. C. A. 334 to condemn certain canned goods alleged to have been unlawfully introduced into inter-

state commerce in the Southern District of Indiana and seized in Missouri. (R. 4).

In both cases petitioner appeared and claimed the goods and petitioned for transfer to Indiana under 28 U. S. C. A. 1404(a). This transfer was granted and the District Attorney entered in the record a statement that there was no objection to the transfer. (R. 7).

Pursuant to the above proceedings the Eastern District of Missouri ordered the cases transferred to the Southern District of Indiana. (R. 8-9).

The Judge of the Indiana Court assigned the cases for trial without objection. (R. 10).

After a jury was impaneled and evidence heard, the Court of its own motion discharged the jury and ordered the cases remanded to the Missouri District. (R. 10-11).

March 21, 1951, the Seventh Circuit Court of Appeals denied petitioner's request to mandate the Judge of the Southern District of Indiana to retain jurisdiction of the cases. (R. 11).

Reasons for Granting Writ

I

The Circuit Court of Appeals has decided an important question of Federal law which has not been and should be settled by this Court, to-wit:

a. It has decided that a claimant in a libel suit brought under the provisions of the Federal Food, Drug and Cosmetic Act (21 U. S. C. A. 334) cannot invoke the provisions of 28 U. S. C. A. 1404(a).

b. It has decided that a judge on transfer from another district has no power to enforce his decrees against the Marshal of the original district.

c. It has decided that where goods subject to seizure from the time of their entrance in interstate commerce were not actually seized until they reached their desti-

nation, the action could not have been brought in any other district than the one where they were actually seized.

II

The Circuit Court of Appeals has rendered a decision in conflict with a decision of the Third Circuit Court of Appeals on the same matter, to-wit:

Transfer under 28 U. S. C. A. 1404(a) is a question of venue and can be waived by the parties.

Paramount Pictures v. *Rodney* 186 F(2), 111.

WHEREFORE, petitioner prays that this Court issue its Writ of Certiorari directed to the United States Court of Appeals for the Seventh Circuit, and that the decision of that Court in this case be reviewed by this Court.

WILLIAM C. BACHELDER,
EUGENE M. FIFE, JR.,
BACHELDER, BACHELDER & FIFE,
Attorneys for Petitioner.

STATE OF INDIANA,
County of Marion, ss:

William C. Bachelder, being duly sworn upon his oath, says that he is one of the attorneys for the Petitioner in the above entitled cause and that the statements of fact herein contained are true.

WM. C. BACHELDER.

Subscribed and sworn to before me a Notary Public in and for said County and State this 17th day of April, 1951.

GEORGIA M. KIDWELL,
[SEAL.] *Notary Public.*

My Commission expires March 15, 1955.

BRIEF

In Support of Petition for Writ of Certiorari

I

The Circuit Court of Appeals has decided an important question of Federal Law which has not been and should be settled by this Court.

A. Section 1404(a) has been interpreted by this Court as a remedial statute to relieve litigants from the expense of transferring their witnesses, records, etc. to a foreign jurisdiction, which expense makes it difficult and perhaps impossible to protect the rights of litigants and to that extent denies them due process of law.

An action under the Food, Drug & Cosmetic law is a civil action. This Court has discussed this matter and decided that wherein any libel under the Food, Drug & Cosmetic Act has been brought and a claimant appears and asserts an ownership in the goods the case becomes a normal civil action and is subject to the rules of civil procedure even though the original proceeding was in admiralty. The words of the Supreme Court are as follows:

> "We do not think it was intended to liken the proceedings to those in admiralty beyond the seizure of the property by process in rem, then giving the case the character of a law action with trial by jury if demanded, and with the review already obtained in actions at law."
>
> *443 Cans of Frosty Egg Product* v. *U. S.*, 226 U. S. 172-183, 57 Law Ed. 175-179.

Petitioner believes that it is obvious from the above holding of this Court that the proceeding in rem only applies to the apprehension of the offending article and that as soon as a claimant appears it becomes an ordinary civil action.

B. The Circuit Court of Appeals stated in its opinion (R. 15) that the trial Court on a transfer could not make its decisions and decrees enforceable against the Marshal in another district.

This is directly refuted by the many actions that have been transferred under the provisions of the Food, Drug & Cosmetic Act which provides that in case two or more seizures have been made in different Districts, they can be consolidated for purpose of trial at a convenient District.

21 U. S. C. A. 334(b) & (f-2).

This provision has been frequently applied in food cases and the petitioner knows of two cases wherein such action was taken. In the case of *Salamonie Packing Company* v. *U. S.*, 165 Fed. 2d, 205, seizures were transferred from the Northern District of Ohio, Eastern Division, the Western District of Pennsylvania, Northern District of Ohio, Western Division, to the Eastern District of Missouri. All of these cases were consolidated in the Eastern District of Missouri, although the goods remained in the custody of the Marshals in the various other Districts. The Judge of the Eastern District of Missouri rendered a judgment of condemnation and its judgment was complied with by the Marshals of the various other Districts.

Petitioner also knows of similar type of action in Florida where seizures in various Districts were transferred for trial to the Northern District of Florida from the Districts of Maryland, Pennsylvania and California. There are various other cases wherein the consolidation and transfer of multiple seizures have been removed for trial to Courts other than that wherein the goods were seized and the trial judge in every instance had no difficulty in having his decree enforced by the Marshals in foreign Districts. The statute itself indicates that Congress did give the power to District

Courts to enforce their decrees against Marshals in other Courts.

C. Both the wording of the libel and the wording of the Food, Drug & Cosmetic Act provides that goods violating the law are subject to seizure when introduced in interstate commerce and from then on wherever they may be found. It is petitioner's contention that these goods could have been seized in Indiana where they were introduced into commerce and therefore the action might have been brought in Indiana.

It is immaterial in so far as the purposes of 1404(a) are concerned whether the goods were seized where they could have been seized first or after they arrived at their destination. The purpose of 1404(a) is to permit a defendant or a party litigant to remove the case to a convenient forum, that is, to relieve him of the obligation to carry his witnesses, records, etc. to a far distant place of trial, thereby adding an expense which in many instances amounts to more than the value of the goods seized and in effect constitutes a denial of due process of law. The fact that the goods could only be seized where they were found should not affect the right of the claimant to have the trial removed to a convenient place for himself, his witnesses and his records. The purpose of the Act was to relieve litigants from this burden of trying their affairs at a distance and is one of the fundamental principles of the development of local Courts both in English and American law.

It may be recalled that originally under English law the litigant had to follow the Court with his witnesses and have his case tried wherever the Court might be sitting. The Court at that time was the King. In order to mitigate this expense against litigants, local Courts were created so that litigants would not be forced to follow the King all over the British Isles.

In our jurisprudence the theory has constantly been to relieve litigants from that extraordinary expense of moving from one place to another to obtain legal relief. When business corporations attained a nation-wide activity, Congress provided that defendants could be sued wherever found. This eventually became a hardship upon defendants because they were frequently forced to bring their evidence away from the scene of the action to a remote forum and were thereby impoverished in their attempts to protect themselves against litigation.

Section 28 U. S. C. A. 1404(a) was enacted by Congress in order to alleviate this hardship.

Ex Parte Collett, 337 U. S. 55, 93 L. Ed. 1207.
U. S. v. *National City Lines,* 337 U.S. 78, 93 L. Ed. 1226.

It is obvious from these decisions of this Court that the purpose of the statute was to relieve litigants, not to deprive plaintiffs of their rights of action wherever they chose to bring it, but that after the action was brought, it could be transferred to a forum convenient to the defendant.

It must be assumed that when Congress provided for a transfer of a case, it granted the power to the transferee Court to enforce its decrees in the District of original jurisdiction.

It is petitioner's contention that since the goods could have been seized in the District of Indiana, the action could have been brought in the District of Indiana and the case could be transferred to the District of Indiana under Section 1404(a).

II

The secondary question involved in this action is whether or not the parties can waive the forum inasmuch as it is a question of venue and not jurisdiction. In this respect the

decision of the 7th Circuit directly contravenes a decision of the 3rd Circuit on the same question. The 3rd Circuit held that a transfer under 28 U. S. C. A. 1404(a) is a question of venue and can be waived by the parties.

Paramount Pictures v. *Rodney,* 186 Fed. 2d., 111.

The 7th Circuit has held directly to the contrary.

Record Page 28.

This question should be decided by this Court inasmuch as the record shows that the Government entered a specific statement in the record that it made no objection to the transfer and the Indiana District Court submitted the case to a jury without objection, and if this is a matter of venue and not jurisdiction, the waiver of both parties to the venue should have given to the Indiana District the right to hear and decide the action and its conduct in dismissing the action on its own motion should be reviewed by this Court.

Wherefore, petitioner prays that this Court issue its Writ of Certiorari directed to the U. S. Court of Appeals for the 7th Circuit that the decision of that Court in this case be reviewed.

WILLIAM C. BACHELDER,
EUGENE M. FIFE, JR.,
BACHELDER, BACHELDER & FIFE,
Attorneys for Petitioner.

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United States v. *396 Barrels, etc.*, Fed. Cas. No. 16502 — 11

United States v. *23 Gross Jars * * * Enca Cream*, 86 F. Supp. 824 — 12

Statutes:

Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, 21 U. S. C. 301:

Sec. 304 (a) — 2, 9, 18

Sec. 304 (b) — 3, 18

Sec. 304 (d) — 4, 10

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Title 28, United States Code:

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 718

FETTIG CANNING COMPANY, PETITIONER

v.

WILLIAM E. STECKLER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 11–16) has not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered March 21, 1951 (R. 17). The petition for a writ of certiorari was filed May 3, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a seizure action brought under Section 304 of the Federal Food, Drug, and Cosmetic Act charging adulteration may be removed to another district for trial.

STATUTES INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040, 21 U. S. C. 301 et seq., provides in part:

> SEC. 304. (a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: *Provided, however,* That no libel for condemnation shall be instituted under this Act, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this Act based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this Act, or (2) when the Administrator has

probable cause to believe from facts found, without hearing, by him or any officer or employee of the Agency that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial.

(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury. When libel for condemnation proceedings under this section, involving the

same claimant and the same issues of adulteration or misbranding, are pending in two or more jurisdictions, such pending proceedings, upon application of the claimant seasonably made to the court of one such jurisdiction, shall be consolidated for trial by order of such court, and tried in (1) any district selected by the claimant where one of such proceedings is pending; or (2) a district agreed upon by stipulation between the parties. If no order for consolidation is so made within a reasonable time, the claimant may apply to the court of one such jurisdiction, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specifiy a district of reasonable proximity to the claimant's principal place of business, in which all such pending proceedings shall be consolidated for trial and tried. Such order of consolidation shall not apply so as to require the removal of any case the date for trial of which has been fixed. The court granting such order shall give prompt notification thereof to the other courts having jurisdiction of the cases covered thereby.

* * * * *

(d) Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section,

direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such article shall not be sold under such decree contrary to the provisions of this Act or the laws of the jurisdiction in which sold: * * *

(e) When a decree of condemnation is entered against the article, court costs and fees, and storage and other proper expenses, shall be awarded against the person, if any, intervening as claimant of the article.

(f) In the case of removal for trial of any case as provided by subsection (a) or (b)—

(1) The clerk of the court from which removal is made shall promptly transmit to the court in which the case is to be tried all records in the case necessary in order that such court may exercise jurisdiction.

(2) The court to which such case was removed shall have the powers and be subject to the duties, for purposes of such case, which the court from which removal was made would have had, or to which such court would have been subject, if such case had not been removed.

28 U. S. C. 1404 provides as follows:

§ 1404. *Change of venue.*—(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other dis-

trict or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

STATEMENT

Pursuant to Section 304 of the Federal Food, Drug, and Cosmetic Act, the United States filed two separate libels of information in the District Court for the Eastern District of Missouri for the seizure and condemnation of two separate shipments of tomato catsup. Each libel charged that a specified number of cases of tomato catsup were shipped in interstate commerce by the Fettig Canning Company from its plant in Elwood, Indiana, to a designated consignee in St. Louis, Missouri; that the catsup was adulterated within the meaning of Section 402 (a) (3) of the Act by reason of the presence therein of decomposed tomato material (R. 4–7). Pursuant to the libels, the two shipments were seized by the United States marshal in St. Louis, Missouri, where they remain at the present time.

The Fettig Canning Company of Elwood, Indiana, petitioner herein, appeared as claimant, and filed a separate motion in each case requesting that the proceedings be transferred for trial to the United States District Court for the Southern District of Indiana. A memorandum order was entered in each case granting the motion. Each of these orders bears an endorsement of the Assistant United States Attorney for the Eastern District of Missouri to the effect that there was no objection to the transfer of the case (R. 7). Separate orders were also entered by the District Court, respectively dated January 9 and January 11, 1950, directing that the cases be transferred to the District Court for the Southern District of Indiana. Each of said orders contained the following recital disclosing the grounds upon which it was based (R. 8–9):

> * * * and it further appearing that the products involved herein were introduced into interstate commerce in, and therefore that this action might have been brought in, the aforesaid Southern District of Indiana, Indianapolis Division, as provided for in Title 21, Section 334, U. S. C. and is removable under Title 28, Section 1404 of U. S. C. * * *

Thereafter, the two proceedings were consolidated for trial by the District Court for the Southern District of Indiana (R. 10). During the course of the trial the court determined that

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it did not have jurisdiction over the cases and upon its own motion directed that they be remanded to the Eastern District of Missouri, Eastern Division (R. 10–11).

Petitioner filed a petition for a writ of mandamus in the Court of Appeals seeking an order to compel the District Court to retain jurisdiction of the cases until the final adjudication thereof (R. 1–3). Respondent filed an answer to the petition which, after alleging the facts as hereinbefore related, prayed that the relief requested be denied and the petition be dismissed (R. 11) for the following reason:

> The District Court for the Eastern District of Missouri had no power or authority either under 21 U. S. C. 334 or 28 U. S. C. 1404 (a) to transfer these cases to the Southern District of Indiana for trial.
>
> The District Court for the Southern District of Indiana is without any jurisdiction in these proceedings, and it cannot obtain jurisdiction by consent or waiver.
>
> The remand of these cases to the Eastern District of Missouri was proper and in accordance with recognized procedure.[1]

The Court of Appeals affirmed the action of the District Court in holding that the Indiana Court was without jurisdiction, and in remand-

[1] The respondent's answer to the petition for a writ of mandamus does not appear in the record printed for this Court.

ing the cases to the Eastern District of Missouri (R. 16).

ARGUMENT

28 U. S. C. 1404 (a) provides that for the convenience of witnesses, etc., "A district court may transfer any civil action to any other district or division where it might have been brought." Petitioner contends (Pet. 7–8) that, since the contraband articles were introduced into interstate commerce at Elwood, in the Southern District of Indiana, the seizure proceedings could have been instituted there and, hence, that the actions could be transferred there under Section 1404 (a). The fallacy in this view is, as the opinion of the Court of Appeals explains (R. 14), that jurisdiction in cases of this character is not dependent upon where the seizure might have taken place, but is limited to the district in which the article is found and actually seized. Since, therefore, the proceedings could not have been brought in the Indiana District, such proceedings could not be transferred to that District under Section 1404 (a).

The jurisdiction of the District Courts for the seizure and condemnation of contraband articles under the Federal Food, Drug, and Cosmetic Act is prescribed in Section 304 (a) of the Act, which provides that an adulterated or misbranded article may be condemned in any district court "within the jurisdiction of which the article is

found."[2] The statute then provides for the filing of a libel of information and the issuance of a warrant of seizure or monition in accordance with admiralty procedure. If the article is found and seized within the district, the court of that district has the power to enter a decree for the condemnation and destruction of the res in accordance with the provisions in Section 304 (d) and to issue such process as is necessary to effectuate the decree. The Court's jurisdiction to proceed is dependent upon the actual seizure of the article; if the article is not found and seized, there is nothing with respect to which any jurisdiction can be exercised. The proceeding is, therefore, one in rem. The contraband article is considered to be the offender, and the judgment or decree under Section 304 (d) is directed against the property seized. See *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, 57; *443 Cans of Frozen Egg Product* v. *United States,* 226 U. S. 172.

A proceeding in rem against specific property is local in character. *Casey* v. *Adams,* 102 U. S. 66; *The Willamette,* 53 Fed. 602 (D. Wash.).

[2] It is fundamental concept that inferior Federal Courts have only such jurisdiction as is expressly vested in them by Congress. *Teel* v. *Chesapeake & Ohio Ry. Co. of Virginia,* 204 Fed. 918 (C. A. 6); *United States* v. *74 Cases, etc., C. C. Brand Oysters,* 55 F. Supp. 745 (W. D. S. C.). See, also, *Chicot County Drainage District* v. *Baxter State Bank et al.,* 308 U. S. 371, 376; *United States ex rel. Carapa* v. *Curran,* 297 Fed. 946, 954 (C. A. 2).

A basic fact essential to the exercise of jurisdiction is the court's actual or constructive possession; the res must be actually or constructively within the reach of the court. *United States* v. *Mack*, 295 U. S. 480, 484; *Strong* v. *United States*, 46 F. 2d 257 (C. A. 1); *The Brig Ann*, 3 L. ed. 734. Such a proceeding must necessarily be brought in the court within the jurisdiction of which the article may be found, and where the article may be subjected to the jurisdiction and power of the court. District courts have no jurisdiction of seizure actions in respect to seizures made in a district other than the place where the proceedings are instituted. *Keene* v. *United States*, 3 L. ed. 108; The *Little Ann*, Fed. Cas. No. 8397; *The Octavia*, Fed. Cas. No. 10422, affirmed 4 L. ed. 25; *United States* v. *396 Barrels, etc.*, Fed. Cas. No. 16502; *The Idaho*, 29 Fed. 187 (D. Oreg.).[3]

Section 1404 (a) permits transfer of "any civil action" to a district "where *it* might have been brought." [Italics supplied.] *This* suit could not have been instituted in the Indiana District because the article was not found there and could not be seized there, irrespective of whether *another* suit might have been brought at another time against the same property in that district. This is the view of the court below and

[3] Under general provisions of law a United States District Court cannot issue process beyond the limits of the district. *Robertson* v. *Labor Board*, 268 U. S. 619, 623.

of all the other courts in which the question of removal under Section 1404 (a) has been considered. In *Clinton Foods, Inc.*, v. *Moore,* decided by the Court of Appeals for the Fourth Circuit on April 2, 1951,[4] the court said:

> The condemnation proceedings against the 630 cases of orangeade could not have been brought in any district other than the Southern District of West Virginia, for it was there that the property sought to be condemned was situate. It is well settled that a proceeding in rem against the specific property is local in character and must be brought where the property is subject to seizure under process of the court. * * * Since the suit for condemnation of the 630 cases of orangeade could not have been brought in any other district than that in which they were seized, it is clear that it may not be transferred from that district under the provisions of 28 U. S. C. 1404 (a).

In the Northern District of Ohio in *United States* v. *23 Gross Jars* * * * *Enca Cream,* 86 F. Supp. 824, the court said (p. 825):

> It is true that under Supreme Court decisions this action would be covered by the phrase "any civil action," but, by the clear and unambiguous words of the statute, such civil action cannot be trans-

[4] Since this opinion has not been reported, copies are being filed with the Clerk for the convenience of the Court.

ferred to a district where the action could not originally have been started.

This libel having been brought under favor of 21 U. S. C. § 334, the articles may be condemned "in any district court of the United States within the jurisdiction of which the article is found." Since the articles were found in the Western District of Pennsylvania this action only could be commenced in that district. It could not, under Section 334, have been brought in this district. Since this is so and since Section 1404 (a) may only be used to transfer actions to districts where they could have been brought, it follows that Section 1404 (a) could not be used to transfer this action here.

In *United States v. 11 Cases, etc., Ido-Pheno-Chon,* 94 F. Supp. 925 (D. Oreg.), the libel charged misbranding and adulteration. Claimant made a motion to transfer the case to the Southern District of California. In discussing the applicability of Section 1404 (a), the opinion states (p. 927):

> Title 21, U. S. C. A. § 334 (a) gives the power to transfer a single libel action where the charge is misbranding. But the charge here is adulteration and misbranding. There is no authority here for transfer.
>
> Title 28, U. S. C. A. § 1404 (a) gives power to transfer any civil action to any district where it might have been brought.

> This action could only have been brought in Oregon, because here alone was the res "found." Title 21 U. S. C. A. § 334 (a); Title 28 U. S. C. A. § 1395 (d), New Judicial Code.
>
> Title 28 U. S. C. A. § 1404 (b) provides for transfer of an in rem proceeding from one division of the same district to another division. This is, of course, permissible because the same District Court retains jurisdiction of the res. The provision would be of doubtful validity otherwise. But the language does not permit transfer of a res in judicial custody of one District Court to another, as is sought here.
>
> Since no statutory provision exists, this Court is without power to initiate the transfer. No other District Court has the jurisdiction to hear the cause if transfer issue.

The same question was presented in *United States* v. *91 Packages* * * * *Nutrilite Food Supplement, etc.*, 93 F. Supp. 763 (D. N. J.). In denying the claimant's motion for a change of venue the court said:

> There is no doubt but that the actions under consideration are civil actions, *Ex-Parte Collett*, 337 U. S. 55, * * * but are they such actions as might have been brought in any other districts than those in which they were brought? The answer is, no, because they were brought as actions in rem, and as such could be commenced

> only where the res was found at the time. 28 U. S. C. A. § 1395 (b).

28 U. S. C. 1404 (a) does not create any new original jurisdiction in district courts. If the District Court for the Southern District of Indiana did not have jurisdiction for the seizure and condemnation of goods found in Missouri prior to the enactment of Section 1404 (a), it does not now have such jurisdiction. The reviser's notes which accompany Section 1404 (a) in the current revision of Title 28 of the United States Code explain that—

> Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper.

Prior to its enactment, the application of the doctrine required the dismissal of the suit. *Gulf Oil Corporation* v. *Gilbert,* 330 U. S. 501. Section 1404 (a) substitutes the remedy of transfer for the more drastic remedy of dismissing the action upon the ground of the inconvenience of the forum. See *Ferguson* v. *Ford Motor Co.,* 89 F. Supp. 45 (S. D. N. Y.), affirmed, *Ford Motor Co.* v. *Ryan,* 182 F. 2d 329 (C. A. 2). In all cases in which the doctrine comes into play, however, there must be at least two forums in which the defendant is amenable to process. *Gulf Oil Corporation* v. *Gilbert,* 330 U. S. 501, 507. It is, therefore, apparent that the doctrine of forum

non conveniens, with respect to which Section 1404 (a) is intended to operate, can never be applied to a proceeding in rem which can be brought only in the district of the res.

The language of 28 U. S. C. 1404 (b) supports the view that Section 1404 (a) was not intended to apply to in rem actions. Section 1404 (b) provides:

> (b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

It is obvious that the second sentence is meant to apply to transfers between divisions in the same district.[5] The very fact that Section 1404 (b) provides specifically for the transfer of in rem actions under certain circumstances from one

[5] The reviser's notes which the Supreme Court considers "obviously authoritative" (*United States* v. *National City Lines*, 337 U. S. 78, 81), state with reference to subsection (b):

"Subsection (b) is based upon section 163 of title 28, U. S. C., 1940 ed., which applied only to the district of Maine. This revised subsection extends to all judicial districts and permits transfers of cases between divisions. * * *"

division to another in the same district shows that Congress realized that such proceedings could not be transferred from one district to another district under Section 1404 (a).

In an endeavor to support its position, petitioner contends (Pet. 5) that the in rem character of a seizure action under Section 304 terminates after the seizure is made, and that, as soon as a claimant appears, the cause becomes an ordinary civil action between the Government and the claimant, citing *443 Cans of Frozen Egg Product* v. *United States,* 226 U. S. 172. That case, however, holds merely that the proceedings do not remain like those in admiralty beyond the seizure by process in rem so as to be subject to appeal as in admiralty; it does not hold that the proceedings lose their in rem character to become actions in personam. The Court distinguished seizures on land from seizures at sea; it did not hold that a seizure is not an in rem action. The proceeding clearly continues as one in rem against the seized property since the judgment is against the contraband article. *Hipolite Egg Co.* v. *United States,* 220 U. S. 45, 57.

Petitioner argues (Pet. 6) that the statement in the opinion below, to the effect that there is no provision by which a condemnation decree could be made effective beyond the territory of the district wherein the seizure is made (R. 15), is directly refuted by the many actions that have

been transferred under the act. It is true that Section 304 (a) authorizes removal of seizure actions to other districts for trial under certain conditions and that, in such case, Section 304 (f) (2) specifically vests in the court to which the case is removed the powers of the court from which removal was made. It is the Government's position that in such cases, the clear implication is that the decree may be directed to the Marshal in the district where the goods were seized and that he may execute it in that district. However, under the act, the power of a district court to transfer a case to another district for trial is limited to a single proceeding for *misbranding* (not adulteration) under Section 304 (a), and to proceedings pending in two or more jurisdictions involving the same issues which may be consolidated and removed under Section 304 (b). No transfer to another district for trial may be had except within the limits of the authority contained in Section 304.[6]

Since the act confers no authority to consolidate or remove two single adulteration cases brought in the same district, as in the instant case, the court to which the transfer was sought would have no power to enter an effective decree.

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[6] In the absence of express statutory authority a district court does not have the authority to transfer a case to another district for trial. See cases cited in *United States* v. *74 Cases, etc., C. C. Brand Oysters*, 55 F. Supp. 745 (W. D. S. C.).

The argument that the purpose of Section 1404 (a) is to relieve a defendant from the burdens resulting from a trial at a distant place is, we think, fully met by the opinion below which points out that such a contention has no bearing upon the jurisdictional question involved, and should more appropriately be directed to the Congress. *Ex parte Collett,* 337 U. S. 55, and *United States v. National City Lines,* 337 U. S. 78, cited by petitioner, both involved actions in personam which are transitory in nature; the reasoning of those decisions does not bear upon in rem proceedings.

Similarly, petitioner's contention that the decision in the court below contravenes the decision of the Court of Appeals for the Third Circuit in *Paramount Pictures* v. *Rodney,* 186 F. 2d 111, certiorari denied, 340 U. S. 953, ignores the difference between actions in personam and in rem. The *Paramount Pictures* case arose out of suits for treble damages under the Federal Antitrust laws, and was a transitory action *in personam.* In cases of that general character, it is elementary that the venue statutes confer upon the defendant merely a personal privilege or exemption which he may assert or waive at his election. *Neirbo Co.* v. *Bethlehem Shipbuilding Corporation,* 308 U. S. 165. As we have shown, however, in actions of the character involved here, the locus of the res is the essential fact which fixes jurisdiction, and the decisions dealing with

transitory actions do not apply. As this Court said in *Casey* v. *Adams,* 102 U. S. 66, 67–68:

> The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribed generally where one should be sued, included such suits as were local in their character, either by statute or the common law, unless it was expressly so declared. Local actions are in the nature of suits *in rem,* and are to be prosecuted where the thing on which they are founded is situated.

The court below was clearly correct in holding that the Indiana Court never acquired jurisdiction of the subject matter involved, and that the parties' consent to venue was without effect. The asserted conflict does not exist.

CONCLUSION

The case was correctly decided below. It presents no conflict of decisions and is based upon a rule which is universally accepted. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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